witness.[12] The same considerations should apply whether the first trial was criminal and the second, civil, or *vice versa,* for apparently there are no material differences between the two situations.

A. L. L.

FRAUD AND DECEIT—FIDUCIARY RELATIONSHIP—*Derry* v. *Peek* CRITICIZED—A recent decision of the House of Lords is interesting for its definite limitation and implied disapproval of the English rule that requires proof of actual fraud, with knowledge of the falsity of the representations, to support an action of deceit. This rule is laid down in the leading case of *Derry* v. *Peek*[1] and is followed by many American jurisdictions.[2]

The case in question involves the peculiar relationship of solicitor and client, and it is this circumstance that induces the court to distinguish the case and place it beyond the scope of the well-established doctrine that generally prevails. Lord Ashburton, the plaintiff, upon the advice of his solicitor, the defendant, had advanced a large sum of money to another of the latter's clients, with a mortgage as security. The defendant later acquired a second mortgage on part of the property and by his representations induced the plaintiff to release that part, to his ultimate damage in a large amount. There was gross negligence on the part of the solicitor and his conduct was reprehensible to a degree, but there was no evidence of actual knowledge on his part that his statements were untrue nor no proof of an intent to cheat, so as to support a conviction under the English rule. The trial court so found and dismissed the action, after pointing out that, though it had been clearly established that the defendant had advised the plaintiff badly and had fallen short of his duty as a solicitor to his client, a case based on fraud could not be turned into an action on the case for damages. The Court of Appeals, however, reversed the lower court's decision on the ground that there was evidence enough of actual fraud, but the House of Lords has taken the position that this can not be supported by the testimony, and that the plaintiff should be allowed to recover notwithstanding, on the ground that the relationship was one of a fiduciary character, to which the strict rule of *Derry* v. *Peek* should not apply.[3]

It is instructive and interesting to trace the process of reasoning by which the Lord Chancellor, Viscount Haldane, arrived at his conclusion and justified his decision. He realizes that the position

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[12] Barnett v. People, 64 Ill. 325 (1870); Owens v. State, 63 Miss. 450 (1886); U. S. v. Macomb, 5 McLean, 286 (1851). *Contra:* Cline v. State, 36 Tex. Cr. 320 (1896).

[1] Peek v. Derry, 14 App. Cases, 337 (Eng. 1889).

[2] Dilworth v. Bradner, 85 Pa. 238 (1877); Wimple v. Patterson, 117 S. W. Rep. 1034 (Texas, 1909); Kreutz v. Kennedy, 147 N. Y. 124 (1895).

[3] Nocton v. Lord Ashburton, 111 Law Times, 641 (Eng. 1914).

he assumes at first blush might seem a startling one and takes pains to pick his way carefully along what he seems to regard as well known, though seldom trodden, paths of legal precedent. He first points out that Lord Herschell himself in his opinion in *Derry* v. *Peek* recognized the fact that the rule there laid down should not be applied to cases where there is some special duty to give correct information.[4] He declares also that this distinction has been overlooked by subsequent authorities, which, in his words, "show a tendency to assume that the case was intended to mean more than it did".[5] He then goes into the cases since 1889 in an effort to discover some recognition of this distinction and finds that the doctrine was indorsed by Lord Justice Lindley in a later case,[6] which, however, was distinguished on different grounds, thereby giving to that part of the opinion the weight of *obiter dicta* only. He next points out that from the earliest times the Courts of Chancery and of the common law exercised a concurrent jurisdiction in cases of fraud in the real sense, but that in addition the former always exercised an exclusive jurisdiction in cases that involved some special duty or peculiar relationship of trust or confidence. In this class of case, he declares that the term "fraud" was not used in the same sense as in the courts of law. In such cases, equity would "prevent a man from acting against the dictates of conscience as defined by the court" and to such cases the doctrine of *Derry* v. *Peek* never was intended to apply. He characterizes this use of the word "fraud" as unfortunate and calls it a *"nomen generalissimum"*,[7] meaning in Chancery which falls short of deceit, but imports a breach of some fiduciary duty to which equity has attached its sanction. He thus arrives at the conclusion that nothing short of actual fraudulent intention in the strict sense must be proved in an action of deceit, no matter whether a court of law or a court of equity, in the exercise of its concurrent jurisdiction, is dealing with the claim, but not so where "fraud" is referred to in the wider sense used in Chancery to describe cases within its exclusive jurisdiction. There the fault is that the defendant has violated, however innocently because of his ignorance, an obligation which he must be taken by the court to have known, and in that sense, his conduct has been "fraudulent".

[4] The words of the learned lord were as follows: "There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurances he has given."

[5] Even before Lord Herschell's remarks, it had been pointed out by Lord Selborne in Brauntie v. Campbell, 5 App. Cas. 425 (Eng. 1880), that honest belief should be no defence in such cases. See also Burrowes v. Lock, 10 Vesey, 470 (Eng. 1805), where honest belief was no defence to a trustee who had made false statements as to the encumbrance upon the trust fund.

[6] Low v. Bonnerie, 65 L. T. Rep. 533 (Eng. 1891).

[7] See Lord Justice James in Torrance v. Bolton, 27 L. T. Rep. 738; L. Rep. 8 Ch. 118 (Eng. 1872).

Lord Haldane then turns his attention toward the facts of the case in question and shows there exists the peculiar relationship which is necessary. He explains that the special duty may arise from the circumstances and may give rise to an implied contract at law or a fiduciary obligation in equity, and finds that in the principal case, the client would have had a right of action at law for breach of the implied contract to be skillful and careful or in tort for negligence, as a remedy in equity because of the nature of the relationship.

Having thus found both an adequate remedy and the necessary prerequisites, Lord Haldane experiences no difficulty in arriving at a conclusion. Notwithstanding the fact that the declaration expressly set forth fraud and that both the lower courts had held that the action was one of deceit, he finds that it is really "an action based on the old exclusive jurisdiction of a court of equity over a defendant in a fiduciary position" and after some remarks as to the effect of the Judicature Act, affirms the award of damages granted by the Court of Appeals. The rest of the court realizes that this is not strictly the proper remedy but agrees with it nevertheless,[8] and the Lord Chancellor himself admits that the proper form of granting relief would be to order the defendant to restore to the mortgage security what he had procured to be taken out of it.[9]

It is submitted that this case must be taken to be an acknowledgement on the part of the House of Lords that the English doctrine which requires proof of actual fraud in an action of deceit, is too harsh a rule to be applied in all cases. Supported by innumerable decisions which have crowded the reports ever since the rule was announced, the doctrine of *Derry* v. *Peek* had become crystalized into a hard and fast principle by the time this case arose, yet here when the court was confronted with the problem as to whether or not it should apply the rule to a case involving the special duties of a fiduciary relationship, the very tribunal which is responsible for the rule refused to carry it to the limits which all courts up to this time had considered inevitable. Nor can the court be justly criticized for its position. The case was clearly one that demanded reparation for harm done and it is not surprising that the court could not bring itself to apply a principle which would have clearly defeated the ends of justice.

Rather should not the rule itself be open to attack? It proceeds upon the principle that a man should not be branded as a fraud-

[8] See the opinion of Lord Dunedin, who remarks, *inter alia*, as follows: "For the reasons given by the Lord Chancellor, I think there was here a remedy in equity for breach of duty. I agree that the form which that remedy would have taken would not have been damages, but looking to the course which the case has taken, I do not think it incumbent on us to alter the remedy to another which would practically come to much the same."

[9] This would have been possible in this case, for the defendant had a lien on the same property.

feasor, even though he has actually a fraudulent intent and the desire to cheat, if indeed, he does not actually know that the representations he makes are false and the inducements he holds out are pitfalls. A premium is put upon the honest blunderer. No matter how negligent a man may be in obtaining the information he gives, no matter if every other reasonable man would have realized that such information must necessarily be false, if it cannot be proved that there was actual knowledge of the falsity of the statements on the part of the defendant, there can be no conviction in England for deceit. Theoretically there may be grounds to support such a doctrine. Practically, however, it is inconceivable that it should be applied religiously to every case and it is therefore gratifying to note the refusal to do so in this recent decision of the House of Lords.

In America the rule has never been uniformly adopted.[10] Especially in the West is there a tendency to repudiate the English doctrine and to hold the defendant in actions for deceit to a strict liability under all circumstances. It is also of interest to note that Parliament itself was dissatisfied with the rule and shortly after it was announced enacted legislation which made it effectual thereafter with respect to situations similar to the facts of *Derry* v. *Peek*.[11] This recent decision of the House of Lords puts a still further limitation upon the rule. There is some doubt as to whether it was ever intended to be so wide in its application,[12] but however that may be, its scope in this respect is now determined.

L. B. S.

SALES—APPROPRIATIONS—Where there is an executory contract of sale, requiring the seller to appropriate certain goods to the contract, the seller cannot, even though the contract bind the buyer to accept the seller's appropriation, appropriate to the contract goods which are no longer in existence or have been destroyed. B contracted to buy from A, a dealer in oil seed, six thousand tons of soya beans, and a clause in the contract recited that: "In case of resales, a copy of original appropriation shall be accepted by buyers." The shipper of a cargo of soya beans sold it to A while it was still afloat and delivered to A a formal appropriation of the cargo. A intended to re-appropriate the cargo to B's purchase by delivering to B a copy of the "original appropriation", which B would be bound by his

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[10] Grant v. Hushkle, 74 Wash. 257 (1913); Scholfield Pulley Co. v. Scholfield, 71 Conn. 1 (1898); Holcomb v. Noble, 69 Mich. 396 (1888).

[11] Directors' Liability Act of 1890.

[12] See remarks of Lord Herschell, *supra*, note 4. See also criticism by Lord Haldane, in the principal case, as follows: "If among the great common lawyers who decided Derry v. Peek there had been present some versed in the practice of the Court of Chancery, it may well be that . . . more attention would have been directed to the wide range of the class of cases in which, on the ground of a fiduciary duty, courts of equity gave a remedy."